

Using Rational Basis Review in an Establishment Clause Challenge to an Alleged Muslim Travel Ban Undermines Religious Liberty

L. Darnell Weeden

Since there is a great deal of evidence supporting the position that President Trump's travel bans were intended to send the message that the United States had adopted a new policy of discouraging Muslims from coming to America due to their religion, these bans violate the Establishment Clause because the President's anti-Muslim by executive order policy is merely incidentally related to national security. Since there is no legitimate security rationale for the Trump travel bans, they can only be reasonably explained as a demonstration of open hostility toward Muslims. This article in part II will include a discussion of the widespread public perception that President Trump's first travel ban which he issued on January 27, 2017, was targeted at Muslims because of their religion and not about promoting national security. President Trump defended his travel bans as not targeting Muslims because of their religion because the travel bans were about keeping America safe. Part III provides an analysis of the Trump Travel Ban Establishment Clause issue presented in Hawaii v. Trump. The conclusion in part IV agrees with the position that the Court in Trump v. Hawaii failed to hold the executive branch of government accountable for rejecting the First Amendment promise of religious neutrality and tolerance. It should be settled precedent by now that an apparent hostile executive order that allegedly targets Muslims because of their religion under the Establishment Clause must at a minimum meet a standard higher than the rational basis test.

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L. DARNELL WEEDEN[†]

I. INTRODUCTION

The issue to be addressed is whether a reasonable observer would view President Trump’s Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public–Safety Threats¹ requiring foreign nationals from predominately Muslim countries seeking to travel to America to submit to a screening process as a hostile proclamation intended to inhibit the Muslim religion and whether the rational basis standard of review is appropriate under the Establishment Clause of the First Amendment. Under the Immigration and Nationality Act, foreign nationals intending to travel to the United States are required to submit to a screening process to certify that they meet several requirements for admission.² The Act separately delegates to the President the power to control the admission of aliens each time he learns that their admission “would be detrimental to the interests of the United States.”³ Based on the delegation of power given to him by Congress, President Trump decided that he needed to place admission controls on nationals of countries that failed to share enough information in order for the United States to make a well-informed admission decision about whether those nationals, at the time posed, national security risks.⁴ President Trump, quickly following his inauguration, put his signature on Executive Order No. 13,769 (EO-1).⁵ EO–1 charged the Secretary of Homeland Security with the responsibility of supervising a review of the sufficiency of information given by foreign governments

[†] Associate Dean of Research & Faculty Development, Roberson King Professor, Thurgood Marshall School of Law, Texas Southern University; B.A., J.D., University of Mississippi. I would like to give thanks to my wife and my children for their patience while I authored this article.

¹ Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

² *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018).

³ *Id.* (quoting 8 U.S.C. § 1182(f) (2018)).

⁴ *Id.* (citing Proclamation No. 9645, 82 Fed. Reg. at 45,161).

⁵ *Id.* (citing Proclamation No. 9645, 82 Fed. Reg. at 45,161).

regarding their nationals seeking to travel to the United States.⁶ The order suspended for 90 days the admission of foreign citizens from seven countries—Iraq, Libya, Somalia, Sudan, Syria, and Yemen—because those seven nations were earlier identified by Congress or past administrations as creating increased terrorism risks.⁷

Brianna Keilar, a CNN anchor, said because President Trump's EO-1 was not properly vetted it was reasonable to fear that EO-1 may do more to advance terrorists recruitment than advance America's security.⁸ Nevertheless, the White House took the firm position that the travel ban was going to stay in place.⁹ Trump's EO-1 travel ban created a number of protests in American airports across the country, at the U.S. capital, in the South, and Midwest.¹⁰ Major American airports served as a magnet for crowds of people who were angry about the travel ban because they were outraged that millions of people may not be able enter the United States simply because they are Muslim.¹¹ People angry about President Trump's travel ban protested from Los Angeles to Kansas City to Atlanta and other places because of the perception that this was a Muslim travel ban.¹² President Trump quickly defended his travel ban with the declaration, "This is not a Muslim ban as the media is falsely reporting. This is not about religion. This is about terror and keeping our country safe."¹³ President Trump's executive order temporarily prohibiting admission into the United States migrants from seven majority Muslim countries was also temporarily stopped by many federal judges including federal courts in the state of Washington.¹⁴ As tens of thousands of people were protesting the travel ban outside the gates of the White House as well in Boston's Copley Square and in New York's Battery

⁶ *Id.*

⁷ *Trump*, 138 S. Ct. at 2403.

⁸ Brianna Keilar, *Trump's Travel Ban Ignites Protests Across U.S.; Crowds Nationwide Protest President's Travel Ban; Trump's Fresh Defense of*, CNN NEWSROOM (Jan. 29, 2017), 2017 WLNR 4203809.

⁹ *Id.*

¹⁰ Brianna Keilar, *Trump Offers Fresh Defense of His Travel Ban; Trump Reorganizes Natl Security Council; Protests Erupt Across U.S. Over Travel Ban; 16*, CNN NEWSROOM (Jan. 29, 2017), 2017 WLNR 4203811.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Brady Dennis & Jerry Markon, *Trump Stands by Order as Confusion, Dissent Swirl*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/national/health-science/trump-gives-no-sign-of-backing-down-from-travel-ban/2017/01/29/4ffe900a-e620-11e6-b82f-687d6e6a3e7c_story.html?noredirect=on&utm_term=.d474119d4034.

Park, together with the park's views of the Statue of Liberty the lower federal courts were sending signals that help was on the way.¹⁵ "Federal judges began stepping in late Saturday [January 28, 2017], as requests for stays of Trump's action flooded courtrooms. A federal judge in New York temporarily blocked deportations nationwide. The ruling was followed by similar decisions from federal judges in California, Virginia, Washington, and Massachusetts"¹⁶ and so it appears from the very beginning most of the lower federal courts attempted to sidestep the perceived religious discriminatory taint of the Trump travel ban by blocking it.

Since there is a great deal of evidence supporting the position that President Trump's E-O1 was intended to send the message that the United States had adopted a new policy of discouraging Muslims from coming to America due to their religion, these bans violate the Establishment Clause because the President's anti-Muslim by executive order policy is merely incidentally related to national security. Since there is no legitimate security rationale for the Trump travel bans, they can only be reasonably explained as a demonstration of open hostility toward Muslims. This article in part II will include a discussion of the widespread public perception that President Trump's EO-1 which he issued on January 27, 2017, was targeted at Muslims because of their religion and not about promoting national security. President Trump defended his travel bans as not targeting Muslims because of their religion because the travel bans were about keeping America safe. Part III provides an analysis of the Trump Travel Ban Establishment Clause issue presented in *Hawaii v. Trump*. The conclusion in part IV agrees with the position that the Court in *Trump v. Hawaii* failed to hold the executive branch of government accountable for rejecting the First Amendment promise of religious neutrality and tolerance. It should be settled precedent by now that an apparent hostile executive order that allegedly targets Muslims because of their religion under the Establishment Clause must at a minimum meet a standard higher than the rational basis test.

II. A DISCUSSION OF THE WIDESPREAD PUBLIC PERCEPTION THAT PRESIDENT TRUMP'S EXECUTIVE ORDER TRAVEL BANS WERE

¹⁵ *Id.*

¹⁶ *Id.*

TARGETING MUSLIMS BECAUSE OF THEIR RELIGION AND NOT TO
PROMOTE NATIONAL SECURITY

President Trump's EO-1 had an immediate impact on real travelers like Khalid Darweesh.¹⁷ Darweesh worked as an interpreter for U.S. forces in Iraq and was fearful that he would be killed because many fellow interpreters were murdered and he had hid twice to escape violent threats.¹⁸ In 2014, Darweesh made the decision that his family would depart from Iraq so he applied for the Special Immigrant Visas offered to Iraqis who helped American troops.¹⁹ His visa papers came three years later just before President Trump's inauguration.²⁰ After an 11-hour flight to New York City on January 27, 2017, Darweesh, then 58, was advised by a customs officer that his passport would not be stamped to grant him admission.²¹ As Darweesh's flight was in the air flying toward John F. Kennedy International Airport, Trump had authorized Executive Order 13,769, a quickly written 90-day ban on immigration from seven Muslim-majority countries.²² "It immediately created a nascent presidency's first crisis. Thousands already en route to America faced immediate deportation upon their arrival. Tens of thousands of enraged protesters descended on airports."²³

Not many issues have received as much focused attention from the Trump Administration as its approach to immigration which unambiguously focuses on who may enter America and who gets to stay in America. During his January 2017 State of the Union address,²⁴ Trump made it clear that the immigration fight he started a year ago would remain a priority.²⁵ The 30 chaotic hours immediately following Trump's first travel ban set the tone for the chaotic year to come, which included Trump making quick policy decisions or off-the-cuff statements simply to feed his conservative base.²⁶ Trump's EO-1 decree was designed to deliver the message that he was an anti-

¹⁷ Wesley Lowery & Josh Dawsey, *Early chaos of Trump's travel ban set stage for a year of immigration policy debates*, WASH. POST (Feb. 6, 2018) https://www.washingtonpost.com/national/early-chaos-of-trumps-travel-ban-set-stage-for-a-year-of-immigration-policy-debates/2018/02/06/f5386128-01d0-11e8-8acf-ad2991367d9d_story.html?utm_term=.392864e98b36.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Lowery & Dawsey, *supra* note 17.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

immigrant president and that he wanted to make the anti-immigration rhetoric used on the campaign trail public policy according to Douglas Brinkley, a presidential historian at Rice University.²⁷ Brinkley believes the travel ban's implementation was the primary reason the left was inspired to persistently resist the Trump administration during his first year.²⁸ As a candidate, Trump reacted to the December 2015 mass shooting in San Bernardino, California, where 14 were killed, by requesting a "total and complete shutdown" of Muslim immigration.²⁹ Trump and his campaign representatives supported their campaign for a ban by alleging that a total ban of immigrants from Muslim countries were necessary because Muslim immigrants were not vetted carefully enough and they posed a threat to national security.³⁰ "Hours after being taken into detention at JFK, Darweesh pleaded with customs officers not to handcuff him by telling them of how he had worked with the U.S. military."³¹

In spite of his plea the custom officers told, Darweesh that he was not allowed to come to America.³² The morning of January 28, 2017, Darweesh who had been in custody for almost 12 hours was allowed to speak to a lawyer from the International Refugee Assistance Project, who told him his family was out of harm's way and advised him not to put his signature on any paperwork.³³ Of the 1,976 immigrants who were restrained because of the first travel ban, (EO-1) 1,784 were eventually permitted to live in the United States, according to DHS records.³⁴ Approximately 200 others went back to their countries of origin according to immigration lawyers primarily because they signed DHS paperwork while held in custody under the travel ban.³⁵ After six months Darweesh was able to get a green card and lived in North Carolina for a few months before moving to Nashville to accept a job with an asphalt company that was operated by a soldier he had worked with in Iraq.³⁶ Darweesh claims all of the people he has met in America have been wonderful and he said "[e]very morning before I go outside, I say a prayer for the United

²⁷ *Id.*

²⁸ *Id.*

²⁹ Lowery & Dawsey, *supra* note 17.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Lowery & Dawsey, *supra* note 17.

³⁶ *Id.*

States and all of its wonderful people.”³⁷ Although President Trump defended his travel ban, people across the nation were protesting it.³⁸ Crowds gathered in Boston, San Francisco, Washington, and New York as chaos and confusion regarding the status of Muslim travelers rippled through U.S. airports.³⁹ Many detained people were still stuck in legal limbo even after judges in several cities granted an emergency stay for those adversely impacted by the ban.⁴⁰ A legal maneuver helped to free a five year old boy at Washington's Dulles Airport who was detained for hours while his anxious mother waited for him.⁴¹ An American citizen in the Bronx claims the travel ban will probably keep him from moving his grandkids to America who are now stuck in a danger zone.⁴² The unidentified man claims he is a good American citizen with his own business.⁴³ “I have my own house but I don't have my children with me. It's very hard to see people being killed right and left. And I can't save my own children. So, and I have another daughter at Lebanon stuck there with four children. They cannot get here.”⁴⁴

The District Court for the Western District of Washington granted a temporary restraining order blocking the admissions limitations, following that the Court of Appeals for the Ninth Circuit rejected the Government's plea to stay that order.⁴⁵ After the Court of Appeals for the Ninth Circuit rejected the Trump administration's petition to stay the order of the Western District the President revoked EO-1 and replaced it with Executive Order No. 13,780 (E-02) which provided for a comprehensive worldwide review.⁴⁶ Because of the investigative burdens placed on agencies and a goal of reducing the risk created by dangerous individuals entering America without acceptable vetting, EO-2 also temporarily restricted the admission (with case-by-case waivers) for foreign nationals from six of the nations included under EO-1: Iran, Libya, Somalia, Sudan, Syria, and Yemen.⁴⁷ The order justified including those six nations because each

³⁷ *Id.*

³⁸ Keilar, *supra* note 8.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Keilar, *supra* note 8.

⁴⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018) (citing *Washington v. Trump*, 847 F.3d 1151 (2017) (per curiam)).

⁴⁶ *Id.* at 2403–04 (citing Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017)).

⁴⁷ *Id.* at 2403.

one”is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.”⁴⁸ The E0-2 admission limitation was to stay in effect for 90 days in order to allow for a comprehensive worldwide review.⁴⁹ E0-2 was very quickly opposed in court.⁵⁰ The District Courts for the Districts of Maryland and Hawaii announced nationwide preliminary injunctions blocking enforcement of the entry suspension with the corresponding Courts of Appeals sustaining those injunctions, although not on the same grounds.⁵¹ The Supreme Court granted certiorari and stayed the injunctions—permitting the entry suspension to take effect regarding those foreign nationals who failed to present a “credible claim of a bona fide relationship” with an individual or entity in America.⁵² Since the temporary limitations contained in E0-2 ended prior to the Court taking any action, the Supreme Court vacated the lower court decisions as moot.⁵³

While the Supreme Court considered E-02 as a moot legal issue, E0-2 was widely criticized in the court of public opinion.⁵⁴ Even though President Trump's E0-2 travel ban retreats on virtually every single issue that triggered chaos in airports and litigation in federal courts throughout America “many critics of the first order were not declaring victory. Instead, they said they would go back to court and argue the order should still be struck down because it discriminates against Muslims.”⁵⁵ Marielena Hincapie, executive director of the National Immigration Law Center in Los Angeles said because “[t]his is nothing more than Muslim [travel] Ban 2.0” and there are “no amount of tweaks will change that.”⁵⁶ David Cole, the ACLU's national legal director, contended because E0-2 implements religious discrimination under the pretextual guise of national security, E0-2 should be treated as unconstitutional.⁵⁷ Unlike E0-1 it was generally

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018) (citing *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam)).

⁵² *Id.* at 2404 (citing *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam)).

⁵³ *Id.* (citing *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017); *Trump v. Hawaii*, 138 S. Ct. 377 (2017)).

⁵⁴ David G. Savage & Del Quentin Wilber, *Critic Slams New Order as 'Muslim Ban 2.0'*, CHI. TRIB. (Mar. 7, 2017), http://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=49b81dfd-7ab3-49ee-9a49-1322cca2b954.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

understood according to then Homeland Security Secretary John Kelly that EO-2 would “not apply to foreign students, engineers, tourists and relatives who are traveling to this country or temporarily traveling aboard. It is ‘prospective in nature -- applying only to foreign nationals outside of the United States who do not have a valid visa.’”⁵⁸

Although President Trump's slightly modified executive order, EO-2 prohibiting travel from six majority-Muslim countries and prohibiting refugees from admission to the U.S., it was regarded as an inadequate improvement over EO-1 and it remains an unacceptable ban on Muslims, according to Chicago immigration activists.⁵⁹ About a month following federal judge's orders blocking Trump's temporary ban on citizens of seven Middle Eastern and African countries, opponents described Trump's travel ban as “a backdoor ban on Muslims.”⁶⁰ President Trump on March 6, 2017 signed a modified edition of EO-1 denying admission to immigrants from six of those nations and excluding Iraq.⁶¹ “Make no mistake that this is still very much a Muslim ban,” according to Ahlam Jbara, a board member of the Arab American Action Network.⁶² Beginning on March 16, 2017, foreign nationals from Sudan, Syria, Iran, Libya, Somalia and Yemen who are not in the U.S. and did not possess an acceptable visa when the original travel ban took effect on January 27, 2017, were not able to enter America during a 90-day suspension.⁶³ Mary Meg McCarthy, executive director of the National Immigrant Justice Center said EO-2 “is simply a modified refugee and Muslim ban, and a continuation of the Trump administration's smear campaign against refugees and asylum seekers.”⁶⁴ Chicago's Mayor Rahm Emanuel described Trump's EO-2 travel ban as a wolf in sheep's clothing because it represents “a betrayal of our nation's values that our government would slam the door on refugees fleeing war, death and unimaginable conditions, that our government would divide families and that our government would attempt to exclude people based on their religion.”⁶⁵

⁵⁸ *Id.*

⁵⁹ Manya Brachear Pashman & Nereida Moreno, *New Travel Ban Brings Little Relief, Chicago Activists Say Local Groups Argue Revised Order Adds Up to 'Muslim Ban'*, CHI. TRIB. (Mar. 7, 2017), http://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=f7b5a895-cb58-4b2a-8d49-ce4fca225730.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Pashman & Moreno, *supra* note 59.

Attorney General Jeff Sessions' justification for EO-2 was rejected by critics in Kentucky.⁶⁶ Sessions asserted America cannot undermine its security by permitting visitors to enter if their home nations are incapable or reluctant to give the information necessary to vet them in a reliable manner.⁶⁷ However, E-O2 received a piercing rebuke from immigration supporters and refugee groundbreakers in Kentucky, where greater than 4,000 refugees from Iraq, Somalia, Sudan, Iran and Syria have relocated since 2011.⁶⁸ John Koehlinger, director of Kentucky Refugee Ministries, asserted that there was simply no security justification for E-02.⁶⁹

"It's fear-mongering to advance a crude, nativist, anti-immigrant vision of America. These people are refugees, for Christ's sake. They've suffered horrible atrocities."⁷⁰ Koehlinger made the following comment regarding EO-2's alleged national security interest "[w]e've been providing safe haven and a new beginning to refugees in Kentucky for over 25 years. To have this administration paint these victims as some grave internal threat to our national security, for political gain — it's as low-down and shameless as you can get."⁷¹

III. AN ANALYSIS OF THE TRUMP TRAVEL BAN'S ESTABLISHMENT CLAUSE ISSUE PRESENTED IN *HAWAII V. TRUMP*

On September 24, 2017, after completion of the worldwide review President Trump issued Proclamation No. 9645 (EO-3 or Proclamation), which was challenged as unconstitutional in an unsuccessful argument before the Supreme Court in *Trump v. Hawaii*.⁷² The Proclamation was named Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.⁷³ The Proclamation's asserted goal was to make progress in vetting procedures as a result of identifying continuing deficiencies in the information necessary to evaluate whether nationals of certain

⁶⁶ Chris Kenning, *Trump's New Travel Ban Draws Rebuke From Foes In Louisville Iraq Dropped; Exempted Are Visa Holders, Others*, COURIER-J. (Louisville, Ky.), Mar. 7, 2017, at A9, available at 2017 WLNR 7146877.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018).

⁷³ *Id.* (citing 82 Fed. Reg. 45161).

countries here and now, pose “public safety threats.”⁷⁴ To advance that goal, the Proclamation put entry limitations on the nationals from eight foreign countries with systems for managing and sharing information regarding their residents. President Trump considered incomplete and unsatisfactory.⁷⁵

The Proclamation excludes lawful permanent residents and foreign nationals who possess asylum status.⁷⁶ It allows for case-by-case waivers for a foreign national who proves undue hardship and that his admission serves the national interest without presenting a threat to public safety.⁷⁷ Under the Proclamation a waiver might be proper if the foreign national is working toward residing with a close family member seeking critical medical care, or attempting to track important business commitments.⁷⁸ The Proclamation also commands DHS to constantly evaluate whether admission limitations should be changed or extended and to report to the President every 180 days.⁷⁹ At the end of the first 180 review period, President Trump accepted the recommendation of the Secretary of Homeland Security because Chad improved its vetting practices the travel limitations on its nationals be removed.⁸⁰

In the prior proceedings in *Trump v. Hawaii*, the federal district court issued a nationwide preliminary injunction prohibiting execution of the entry limitations.⁸¹ The district court held that the Proclamation violated two provisions of the INA since President Trump failed to make adequate findings that the entry of the covered foreign nationals would be detrimental to the national interest, and the Proclamation discriminates against immigrant visa applicants because of their nationality.⁸² The Court of Appeals for the Ninth Circuit granted the Trump administration a partial stay, allowing implementation of the Proclamation regarding foreign nationals who did not have a bona fide connection with the United States.⁸³ The Supreme Court stayed the injunction in full until the disposition of the

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2406.

⁷⁷ *Id.*

⁷⁸ *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018).

⁷⁹ *Id.*

⁸⁰ *Id.* (citing Proclamation No. 9723, 83 Fed. Reg. 15937 (2018)).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Government's appeal.⁸⁴ The Court of Appeals affirmed.⁸⁵ The Ninth Circuit held that the Proclamation exceeds President Trump's authority under the relevant INA provision because that law only authorizes "temporary" suspension of entry in those emergency situations that Congress could not adequately address.⁸⁶ Under the Ninth Circuit's rationale, the Proclamation clashed with the INA's clear-sighted network of regulations by unreasonably focusing on issues of immigration previously approved by Congress.⁸⁷ The Ninth Circuit held that President Trump's entry restrictions also violated the INA's ban on nationality—discrimination while granting immigrant visas.⁸⁸ The Supreme Court rejected the holding of the Ninth Circuit, that President Trump did not have authority to issue the Proclamation, and declared "[t]he Proclamation is squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs' primary contention below nor in their briefing before this Court was that the Proclamation violated the statute."⁸⁹ The Ninth Circuit failed to address the plaintiffs' Establishment Clause claim.⁹⁰ Although the Plaintiffs unsuccessfully contended the Proclamation was invalid under both the Immigration and Nationality Act (INA) and the Establishment Clause of the First Amendment this article will focus on the plaintiffs Establishment Clause claim because unlike the Court, I support the argument that the Proclamation very likely violates religious liberty under the Establishment Clause since it was driven not by apprehensions affecting national security but was driven by Trump's animus toward Islam.⁹¹

Although President Donald Trump struck out again with his third travel ban before a lower court federal judge who blocked the ban from taking effect nationwide⁹² it was unfortunately rescued by the Supreme Court in *Trump v. Hawaii*.⁹³ Trump's third executive order

⁸⁴ *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 2404-07.

⁸⁸ *Id.* at 2407.

⁸⁹ *Id.* at 2415.

⁹⁰ *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018).

⁹¹ *Contra*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

⁹² *Federal Judge Halts Trump's 3rd Travel Ban; Ruling: Order Uses Nationality As 'A Proxy For Risk'*, HOUS. CHRON., Oct. 18, 2017 at 7, available at 2017 WLNR 32014423.

⁹³ *Trump*, 138 S. Ct. at 2423.

was found to discriminate on the basis of nationality⁹⁴ by a lower federal court rather than religion before it was saved by the Supreme Court.⁹⁵ “In earlier rulings over two prior attempts at a travel ban, judges said they were motivated by bias against Muslims.”⁹⁶ On October 18, 2017, news reports predicted that the Trump administration would appeal the lower court decisions blocking the travel ban and the case could for a second time go to the U.S. Supreme Court, which had created the impression that it much more sympathetic than lower-court judges to Trump’s determination to reduce immigration from majority Muslim countries.⁹⁷ U.S. District Judge Derrick Watson in Honolulu issued a temporary restraining order against the Trump administration (which was subsequently reversed by the Supreme Court) and correctly asserted that America’s federal immigration laws “do not afford the president unbridled discretion to do as he pleases.”⁹⁸ I believe the Supreme Court has tainted its prestige by upholding the third travel ban that was conceived in both national origin and religious hostility.⁹⁹ Judge Watson went on to hold that the third restatement of Trump’s travel ban obviously discriminates on the basis of one’s nationality. Clearly Judge Watson also could have equally concluded the third travel ban plainly discriminates on the basis of one’s religion. A perceptive Judge Watson understood that the Trump administration improperly used the religion of Muslims as a replacement for risk.¹⁰⁰

Reaz Jafri, who leads the immigration practice at Withers Bergman LLP in New York, correctly predicted that President Trump would take his third travel ban to the Supreme Court for resolution because Trump believed his third travel ban would be upheld by the Supreme Court although a federal district court judge had just knocked it down.¹⁰¹ Hawaii Attorney General Doug Chin called Judge Watson’s ruling “another victory for the rule of law.”¹⁰² Because the Supreme Court overruled Judge Watson’s perceived victory for the rule of law by approving the third travel ban it is fair to ask whether

⁹⁴ *Federal Judge Halts Trump's 3rd Travel Ban*, *supra* note 92.

⁹⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

⁹⁶ *Federal Judge Halts Trump's 3rd Travel Ban*, *supra* note 92.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Federal Judge Halts Trump's 3rd Travel Ban*, *supra* note 92.

the Supreme Court has allowed itself to be too closely linked to a President who arguably believes he has unbridled discretion to address any immigration issue that could conceivably raise a national security issue someday somewhere. An analysis of the Supreme Court's decision in *Hawaii v. Trump* has a chilling effect on the celebrated grand narrative that the United States Constitution and its system of democratic governance requires the federal judiciary to function as a check on the illegitimate exercise of power by either Congress or the President.¹⁰³ Although the role of judicial review of the actions of Congress and the President was recognized in *Marbury v. Madison*,¹⁰⁴ the Supreme Court has all but abandoned its role to protect Muslim's fundamental right to identify with their religion by giving undue deference to President Trump under a very dangerously deferential rational basis theory. It may reasonably be argued that *Marbury v. Madison* established principle of judicial supremacy has neither been respected nor followed by the Supreme Court in its "treatment of matters relating to immigration and national security."¹⁰⁵ Immigration scholars have characterized immigration law as operating outside the scope of mainstream constitutional law with the blessings of the Supreme Court under a theory called immigration exceptionalism.¹⁰⁶ Scholars describe immigration exceptionalism as occurring in "the operation of the plenary power doctrine, under which much of what happens to persons who are not U.S. citizens with

¹⁰³ Robert S. Chang, *Whitewashing Precedent: From The Chinese Exclusion Case To Korematsu To The Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1190 (2018) (citing Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1461 (2017); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 671 (1980); Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA.L.REV. 765 (2016); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

¹⁰⁴ *Id.* at 1190–91 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).

¹⁰⁵ *Id.* at 1191–92 (citing Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 10 (2002)); Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 447–458 (2002).

¹⁰⁶ *Id.* at 1192 (citing Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984); Peter H. Schuck, *Introduction: Immigration Law and Policy in the 1990s*, 7 YALE L. & POL'Y REV. 1, 19 (1989); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 10 (1990); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1362 (1999); Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 447–458 (2002); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 585–88 (2017)).

regard to their entry or exclusion into the United States¹⁰⁷--and in some instances, deportation from the United States¹⁰⁸--operates outside the purview of judicial review."¹⁰⁹

Although the term, "national security exceptionalism" is relatively new in academic legal literature and could be used to describe inadequate judicial responses by the Supreme Court to pretextual national security emergencies.¹¹⁰ National security exceptionalism presumes that judicial review in the field of immigration virtually disappears because it gives undue deference to the political branches exercise of power that infringes the fundamental religious liberty of an individual or group to enter America without suffering discrimination because of their religion.¹¹¹ Advocates of immigration and national security exceptionalism could support the contention that such exceptionalism allows constitutionalized discriminatory treatment of Muslim aliens to exist in President Trump's travel bans because the matter is simply not reviewable by courts.¹¹² It appears the Supreme Court failed to check the authority of Trump's Presidential Proclamation 9645 and applied an extreme form of the national security exceptionalism theory in *Hawaii v. Trump*.¹¹³ Professor Robert S. Chang correctly asserts "it is time to bring immigration law and national security law more within the mainstream of constitutional jurisprudence."¹¹⁴ Constitutionally mainstreaming immigration law and national security law is necessary and proper in order to protect the rights of Muslims under the Establishment Clause as well as to safeguard the prestige of the Court so it may avoid the political taint of fake judicial review during the tenure of President Trump.¹¹⁵

Before addressing the plaintiffs' claim that the Proclamation was issued with an unconstitutional goal of excluding Muslims, the Court decided it had jurisdiction under Article III because the plaintiffs had

¹⁰⁷ *Id.* at 1192 (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1888)).

¹⁰⁸ *Id.* at 1192–93 (citing *Ting v. United States*, 149 U.S. 698, 713–14 (1893)).

¹⁰⁹ Chang, *supra* note 103, at 1192–93.

¹¹⁰ *Id.* at 1209 (citing *Aziz Z. Huq, Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226 (2009)).

¹¹¹ *Id.* (citing *Aziz Z. Huq, Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 231 (2009)).

¹¹² *Id.* at 1213

¹¹³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

¹¹⁴ Chang, *supra* note 103, at 1222.

¹¹⁵ *Id.*

standing to generate a constitutional challenge.¹¹⁶ In a case involving an asserted violation of the Establishment Clause, a plaintiff needs to demonstrate that he is distinctly touched by the legal rules or practices which are being challenged in his complaint.¹¹⁷ The standing issue was presented in *Trump v. Hawaii* because the entry limitations do not actually restrict the plaintiffs but others who want to enter the United States.¹¹⁸ The three individual plaintiffs experienced concrete injury: the claimed real-world adverse impact that the Proclamation has had in splitting them up from specific relatives who want to enter the United States.¹¹⁹ “We agree that a person’s interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact.”¹²⁰ The Court correctly held that the individual plaintiffs had Article III standing to contest the exclusion of their Muslim relatives under the Establishment Clause.¹²¹ After granting the plaintiffs standing to have their claim heard before the Supreme Court, I believe the Supreme Court took a rather dismissive attitude towards plaintiffs’ rights by suggesting that plaintiffs’ belief that the Proclamation violates the Establishment Clause by singling out Muslims for disfavored treatment was mere speculation.¹²²

Based on the evidence in the record in *Trump v. Hawaii*, a reasonable observer would agree that the Proclamation was motivated by anti-Muslim animus.¹²³ Under the reasonable observer standard the plaintiffs are likely to prevail on the merits of their Establishment Clause contention.¹²⁴ The majority reaches a different conclusion “by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent,”¹²⁵ I support Justice Sotomayor’s dissent. The

¹¹⁶ *Trump*, 138 S. Ct. at 2415–16.

¹¹⁷ *Id.* at 2416 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224, n. 9 (1963)).

¹¹⁸ *Id.*

¹¹⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (citing *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017)).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Trump*, 138 S. Ct. at 2417.

¹²³ *Trump*, 138 S. Ct. at 2433 (Sotomayor, J., dissenting).

¹²⁴ *Id.*

¹²⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

Court simply failed to acknowledge the strong evidence supporting plaintiffs' argument that President Trump's entry suspension Proclamation operates as a religious gerrymander against Muslims because context matters.¹²⁶

The United States of America has historically endorsed the guarantee of religious liberty. Our Founders respected that fundamental guarantee by entrenching the rule of religious neutrality in the First Amendment.¹²⁷ The Court's judgment in *Trump v. Hawaii* does not protect that fundamental rule.¹²⁸ The Court's judgment permits a plan originally promoted directly and obviously as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a facade of national-security concerns.¹²⁹ But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the taint of religious discrimination that the President's words have created.¹³⁰ In order to justify not applying the strict scrutiny Establishment Clause precedents to aliens seeking to enter this country the Court wrongly concluded that the strict scrutiny test is restricted to laws and policies applied domestically and not to national security issues involving aliens seeking to enter this country.¹³¹ Although the Court assumes that it may look beyond the facial neutrality of the Proclamation the Court without explanation or the help of precedent "limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review."¹³²

Justice Sotomayor is absolutely correct in her belief that Trump's tainted Proclamation fails to meet the rational-basis test because the Proclamation is actually unconnected to any factual context which would allow the Court to recognize a reasonable relationship to a legitimate state interest.¹³³ Since the Proclamation's overall coverage

¹²⁶ *Id.* at 2417.

¹²⁷ *Id.* at 2433 (Sotomayor, J., dissenting).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Contra*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

¹³² *Trump*, 138 S. Ct. at 2441 (Sotomayor, J., dissenting) (citing *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860–863 (2005); *Larson v. Valente*, 456 U.S. 228, 246 (1982); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449–452 (1969); *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008)).

¹³³ *Id.*

is unconnected to the reasons given for its existence the Trump travel ban doctrine is “inexplicable by anything other than animus.”¹³⁴ Justice Sotomayor properly argued that the precedents of the Court hold classifications motivated by discriminatory animus are never legitimate since the Government can never possess a legitimate interest in manipulating simple negative attitudes and fear for a disfavored group.¹³⁵ President Trump’s statements, which the Court completely fails to address in its legal analysis, convincingly confirm the opinion that the Proclamation was delivered to communicate hostility for Muslims and exclude them from the United States.¹³⁶ “Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.”¹³⁷

The public reaction to Justice Sotomayor dissent in *Trump v. Washington* suggests that her dissent was well received and highly respected by many. For example, Maliha Kareem, 19, of Orlando, Florida, a junior at the University of Central Florida studying international studies and a fellow with the Center for Community Change Action agrees with Sotomayor’s assertion that Trump’s travel ban presents a “harrowing picture from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.”¹³⁸ Kareem believes when the U.S. Supreme Court approved what very many people describe as President Trump’s “xenophobic” travel ban, the Court repeated dark moments in our country’s history.¹³⁹ In the 1944 Supreme Court ruling of *Korematsu v. United States* the Court allowed the government to imprison Japanese Americans in detention centers because of their nationality and ethnicity in the interest of defending national security during World War II.¹⁴⁰ Now, President Trump practices similar fear-based reasoning to support his travel ban by alleging that he is safeguarding national security.¹⁴¹ “This is not the first time the court has been wrong, or has allowed official racism and xenophobia to continue rather than standing up to it,” said Anna Eskamani, the daughter of immigrants from Iran, who

¹³⁴ *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

¹³⁵ *Id.* at 2441–42 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985)).

¹³⁶ *Id.* at 2442.

¹³⁷ *Id.*

¹³⁸ Maliha Kareem, *Travel Ban Endures With Injustice*, ORLANDO SENTINEL, July 12, 2018 at 1, available at 2018 WLNR 21185434.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

is a candidate for Florida's House District 47.¹⁴² “History has its eyes on us,” Eskamani said, “and will judge these decisions harshly.”¹⁴³

It appears that Justice Sotomayor’s powerful, encouraging, inspirational dissent in *Trump v. Hawaii* inspired the comments made by both Kareem and Eskamani because Sotomayor declared the First Amendment represents opposition to official religious prejudice and personifies our Nation's profound commitment to religious diversity and religious tolerance.¹⁴⁴ The constitutional promise of tolerance for religious diversity is the reason over the centuries people travel to America from every location in the world to share in our blessing of religious liberty.¹⁴⁵ As a substitute for religious tolerance the *Trump v. Hawaii* decision distorts the First Amendment by granting deference “to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court's precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty.”¹⁴⁶ Kareem no doubt agrees with Justice Sotomayor’s observation that the Court’s judgment in *Trump v. Hawaii* “is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*.”¹⁴⁷

Justice Sotomayor diplomatically acknowledged that the Court took a necessary and proper step in finally officially overruling *Korematsu* because the decision was wrongheaded the day it was approved by the Court.¹⁴⁸ The official rejection of *Korematsu* as a shameful precedent, while commendable and long past due, does not validate the majority's judgment in the *Trump v. Hawaii* travel ban case.¹⁴⁹ “By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one ‘gravely wrong’ decision with another.”¹⁵⁰ I would like to thank Justice Sotomayor for her timely reminder that the United States “Constitution demands, and

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Trump v. Hawaii*, 138 S. Ct. 2392, 2446 (2018) (Sotomayor, J., dissenting).

¹⁴⁵ *Id.* (citing *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting)).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2447 (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

¹⁴⁸ *Id.* at 2448; *see id.* at 2423 (citing *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

¹⁴⁹ *Id.*

¹⁵⁰ *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting).

our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments.”¹⁵¹

IV. CONCLUSION

Because the Court's decision in *Trump v. Hawaii* has failed in that regard,¹⁵² it is with reflective respect for the excellent analysis provided by Justice Sotomayor. Her analysis on the Establishment Clause issue is vastly superior to that of the majority because the majority mysteriously employs a very deferential rational basis standard of review to resolve an Establishment Clause issue alleging religious hostility by President Trump.¹⁵³ Under Supreme Court precedent laws that target on the basis of religion should be reviewed under heightened scrutiny whether they come from the Free Exercise Clause or Establishment Clause.¹⁵⁴ The Proclamation is unconstitutional under either a heighten scrutiny standard or a rational basis standard.¹⁵⁵ The Proclamation fails the rational basis standard because it is not linked to a factual context that supports a legitimate state interest because the Proclamation can only be explained by its hostility towards Muslims.¹⁵⁶

On June 4, 2018, the Court rendered a decision in which it emphasized that the government and its public officials have “a duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”¹⁵⁷ If the First Amendment actually commits the government itself to religious tolerance, the animosity to the Muslim religion clearly indicates that the President failed to remember his high duty to the Constitution and to the religious liberty secured under the Establishment Clause.¹⁵⁸ The common issue presented in both *Hawaii v. Trump* and *Masterpiece Cakeshop* is whether a public official demonstrated tolerance and neutrality in making a decision regarding an individual’s fundamental religious liberty.¹⁵⁹ However, unlike in *Masterpiece Cakeshop*, where

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 2441.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Trump v. Hawaii*, 138 S. Ct. 2392, 2441 (2018) (Sotomayor, J., dissenting).

¹⁵⁷ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018).

¹⁵⁸ *See Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

¹⁵⁹ *Id.*

a state civil rights commission was held to have engaged in conduct that disregarded the neutrality demanded by the Free Exercise Clause, President Trump in *Trump v. Hawaii* has not been held liable for rejecting the First Amendment's promise of religious neutrality and tolerance.¹⁶⁰ Different from its opinion in *Masterpiece Cakeshop*, where the Supreme Court treated the state commissioners' remarks regarding religion as persuasive evidence of unconstitutional governmental targeting of religion under the free exercise clause using the strict scrutiny standard the Court in *Trump v. Hawaii* completely sets aside the strict scrutiny standard and utilized the rational basis standard in its Establishment Clause analysis in order to declare the President's hostile statements about Muslims as irrelevant.¹⁶¹ Justice Sotomayor correctly contends the holding in *Trump v. Hawaii* is not consistent with *Masterpiece Cakeshop* because it eats away at the established principles of religious tolerance and it communicates to Muslims they are outsiders who are not invited to visit any community in America.¹⁶²

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting).